Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DANNY K. BASS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DANNY K. BASS
FCC-COLEMAN, LOW
P.O. Box 1031
Coleman, FL 33521-1031

Petitioner.

55 pp

QUESTION PRESENTED

I. WHETHER COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE DISTRICT COURT'S SENTENCING PETITIONER WITH RESPECT TO METHAMPHETAMINE INSTEAD OF AMPHETAMINE AFTER THE JURY RETURNED A GENERAL VERDICT?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered in an unreported, per curiam opinion on April 22, 2002, affirming the final judgment of the United States District Court for the Northern District of Florida. (Appendix A). Also appended hereto are the District Court's order denying § 2255 petition, order dated 4/11/01 (Appendix B), Magistrate Judge Report & Recommendation granting § 2255 petition, dated 7/20/00 (Appendix C), ORDER and Second Report & Recommendation denying § 2255 petition, dated 3/20/01 (Appendix D). The Eleventh Circuit denied the petition for rehearing and the suggestion for rehearing *en banc* on 8/16/02 (Appendix E).

JURISDICTION

Petitioner, DANNY BASS ("Mr. Bass") seeks review of the opinion entered by the Eleventh Circuit Court of Appeals below, in accordance with 28 U.S.C. § 1254(1) and S.Ct. R. 13.1, invoking jurisdiction of this Honorable Court. The instant petition is timely filed and within the 90-days from the date of the denial of the petition for rehearing by the appellate court below.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18 U.S.C. § 812

There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970 and shall be updated and republished on an annual basis thereafter.

Schedule III

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following

substances have a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.

(2) Phenmetrazine and its salts.

Title 18 U.S.C. § 841(b)(1)(D):

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both.

STATEMENT OF THE CASE

A. Procedural History.

On November 21, 1996, a federal grand jury sitting in the Northern District of Florida returned an indictment which charged DANNY K. BASS ("Mr. Bass"), and two other individuals with conspiring to "possess with intent to distribute the controlled substance methamphetamine and amphetamine, in violation of Title 21, United States Code,

Sections 841(a)(1), (b)(1)(A)(viii) and 841(b)(D). All in violation of Title 21, United States Code, Section 846."[1] The indictment contained a second count charging Mr. Bass with possession of a machine gun.

On November 20, 1997, following a jury trial, Mr. Bass and one of the other co-defendants were convicted on both counts. The third co-defendant had pleaded guilty prior to trial. On February 10, 1998, Mr. Bass was sentenced to 188-months imprisonment as to the drug count and a concurrent term of 120-months imprisonment as to the gun count.

On February 20, 1998, Mr. Bass filed a notice of appeal. On November 10, 1998, the Eleventh Circuit Court of Appeals affirmed the judgment and sentence imposed by the district court. *See, United States v. Bass*, No. 98-2222 (11th Cir. 1998) (unpublished opinion).

On February 3, 2000, Mr. Bass filed a motion to vacate, correct or set aside his conviction and sentence pursuant to 28 U.S.C. § 2255. The government opposed the Section 2255 habeas petition. On July 20, 2000, the United States Magistrate Judge issued a Report & Recommendation ("R&R") granting *in part* the Section 2255 petition. The R&R concluded as a matter of law that counsel rendered ineffective assistance at sentencing, requiring a new sentencing hearing. However, on March 30, 2001, the Magistrate Judge issued a second R&R that recommended

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[1] In the indictment, Mr. Bass was charged with violation of Title 21 U.S.C. § 841(b)(D). It is obvious that this is a scrivener's mistake since § 841(b)(D) does not exist. The correct statute intended to be referenced in the indictment was § 841(b)(1)(D).

that the habeas petition be denied. On April 11, 2001, the district court adopted the R&R and denied Mr. Bass' Section 2255 petition.

On June 1, 2001, Mr. Bass timely filed his notice of appeal and an application for a certificate of appealability ("COA"). The district court granted the application and issued a COA. On appeal, the Eleventh Circuit remanded the case for the district court to re-phrase the language in the COA.

On April 22, 2002, the Eleventh Circuit affirmed the district court's judgment and order denying the Section 2255 petition by an unpublished decision. *See, Bass v. United States,* No. 01-13260-E (11th Cir. Decided 4/22/2002) (unpublished).

On August 16, 2002, the Eleventh Circuit denied, by order, Mr. Bass' petition for rehearing and suggestion for rehearing *en banc*. *Id.* Mr. Bass is currently serving his federal sentence imposed in this case at FCC-Coleman (LOW), Coleman, Florida 33521-1031. The Custodian is P. LAIRD, Warden.

B. Facts.

The Indictment in the case *sub judice* consisted of only two counts. Count One charged Mr. Bass and his two co-defendants with Conspiracy to Possess with Intent to Distribute the Controlled Substances Methamphetamine and Amphetamine, in violation of Title 21 U.S.C. § 846 and § 841(a)(1), (b)(A)(viii) and § 841(b)(1)(D). Count two charged Mr. Bass with violation of Title 18 U.S.C. § 922(o)(1). The case proceeded to trial by jury before the district court in Pensacola, Florida.

During the trial, the government presented evidence that Mr. Bass was involved in a drug conspiracy. The evidence consisted of the testimony of alleged drug purchasers of Mr. Bass and his co-defendant. The gist of the testimony of the government's witnesses was that Mr. Bass and his co-defendants were suppliers of methamphetamine and amphetamine. The government introduced lab reports which conclusively showed the drugs seized were amphetamine.

Mr. Bass did not take the stand based on former trial counsel's instruction, notwithstanding Mr. Bass had no prior criminal history.

As to the machine gun charge, the government presented a video of the gun being operated by an ATF Agent. The tape showed the gun fired one shot and stopped. The video tape stopped and then restarted where the gun was shown to fire as a machine gun.

At the close of the trial, and in the absence of a special jury verdict as to the type and quantities of drug, the jury returned a general verdict of guilty as to both counts of the indictment. Thereafter, the district court held a hearing for the purpose of imposing punishment. At said hearing, former trial counsel did not object to the district court sentencing Mr. Bass with respect to methamphetamine instead of amphetamine after the jury returned a general verdict. In the absence of such an objection, the district court sentenced Mr. Bass in accord with the methamphetamine and a term of 188-months imprisonment on the drug count.

Following the Eleventh Circuit's decision affirming Mr. Bass' conviction and sentence, Mr. Bass mounted a post-conviction attack, his first, alleging that his counsel rendered ineffective assistance by failing to object to the

court sentencing Mr. Bass under the more harsh drug statute which references methamphetamine. The habeas case was referred to the Magistrate Judge for a Report and Recommendation ("R&R"). Although the government opposed the petition, the Magistrate Judge opined that Mr. Bass' former trial counsel did in fact render ineffective assistance by failing to object at sentencing to the court's sentencing Mr. Bass with respect to methamphetamine instead of amphetamine. The Magistrate Judge held:

> Had the jury returned a special verdict, or had the sentences for the two substances alleged in the indictment been similar, the government's position would be persuasive. Although the evidence presented at trial clearly tended to show that the conspiracy involved primarily, if not exclusively, methamphetamine, both methamphetamine and amphetamine were charged in the indictment. Notwithstanding the evidence adduced at trial, based on the authority of *Edwards* [, 523 U.S. F.3d 1254 (11th Cir. 1998)], it appears that the sentence on Count I, which was in excess of the five year statutory maximum under 21 U.S.C. § 841(b)(1)(D) for offenses involving amphetamine was in error. Therefore, under the facts of this case counsel should have objected to the court's sentencing movant based on methamphetamine in the absence of a special verdict, and his failure to do so resulted in prejudice to the movant. The motion to vacate should be granted as to this issue, and movant's case should be scheduled for resentencing.

R&R dated 7/20/2000.

The government did not file any objections to the Magistrate Judge's R&R. Although the case was returned

to the district court for a final decision on the R&R, some 9 months later, the Magistrate Judge, *sua sponte*, issued a second R&R on March 30, 2001. In this second R&R, the Magistrate Judge reversed his decision and recommended that the § 2255 petition be denied *in toto*. The Magistrate Judge concluded in this second R&R:

> Although title 21 U.S.C. § 812 still lists amphetamine as a Schedule III controlled substance, the applicable and controlling federal regulations were amended in 1971 to list amphetamine as a Schedule II controlled substance. . . . Therefore, notwithstanding the fact that movant was charged under § 841(b)(1)(D), and the statutory listing of amphetamine as a Schedule III controlled substance, the penalties applicable to an offense involving the Schedule II substance amphetamine are set forth in 21 U.S.C. § 841(b)(1)(C). . . . Movant's 188 month sentence was below the statutory maximum.

R&R, dated 3/30/2001.

On April 6, 2001, Mr. Bass timely filed his objections to the second R&R contending the Magistrate Judge made several erroneous findings. The district court overruled the objections and denied the Section 2255 petition. This case is now properly before this Court for review.

REASONS FOR GRANTING THE PETITION

Mr. Bass respectfully submits that the appellate court below erred as a matter of law in affirming the district court's order denying habeas post-conviction relief. For the reasons argued below and the implications of Mr. Bass' Sixth Amendment rights at the penalty phase in the

criminal case, he requests this Court to grant the instant petition and vacate the decisions below.

The Eleventh Circuit Court of Appeals ruled against Mr. Bass, opining that "[h]is 188-month sentence falls below the relevant maximum allowable prison sentences of either life for methamphetamine under Section 841(b)(1)(A)(viii), or twenty years for amphetamine under Section 841(b)(1)(C). . . . Accordingly, the failure [of counsel] to object [to the sentence] was neither unreasonable nor prejudicial." *OPINION, at p.4.*

On the contrary and consistent with the first R&R issued by the Magistrate Judge, Section 841(b)(1)(D) provides that in the case of a violation involving any controlled substance in schedule III, an offender shall be sentenced to a term of confinement of not more than five (5) years. 21 U.S.C. § 841(b)(1)(D). Amphetamine, its salts, optical isomers and salts of its optical isomers are listed in Title 21 U.S.C. § 812, Schedule III(a)(1). *See, United States v. Daniel*, 813 F.2d 661, 663 (5th Cir. 1987) ("[T]he statute under which Daniel was prosecuted unequivocally forbade the distribution of amphetamine.") (citing 21 U.S.C. § 812(c)).

In the habeas court below, Mr. Bass claimed that because the jury returned a general verdict that did not specify which of the two controlled substances identified in the indictment was the basis for its findings of guilt, he must be sentenced as if the conspiracy involved distribution only of the drug carrying the lower penalty, in this case amphetamine. *See, United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2nd Cir. 1984) (sentence of defendant charged in marijuana and cocaine conspiracy and who was sentenced to a term in *excess* of the statutory

maximum for marijuana-related conspiracies was improper because the general jury verdict did not reveal whether the jury had found defendant guilty of a cocaine-related or a marijuana-related conspiracy).

This Court was confronted with a similar case and concluded that the sentencing guidelines instruct a sentencing judge to base a drug-conspiracy offender's sentence on the offender's relevant conduct and that this can include conduct that is outside of the offense of conviction, but is part of the "same course of conduct or common scheme or plan." *Edwards v. United States*, 523 U.S. 511, 118 S.Ct. at 1477. However, this Court was quick to point out that a statutory and constitutional claim could arise if the sentence a defendant in a multi-substance conspiracy received exceeded the maximum permitted by statute for a conspiracy involving only one of the substances "because a maximum sentence set forth by statute trumps a higher Guidelines sentence." *Id.*, 118 S.Ct. at 1477. The situation that is found in the case *sub judice* did not arise in *Edwards*, as the defendants' sentences were within the statutory limits applicable to a conspiracy involving only cocaine, the substance with the lesser penalties, given the quantities of that drug attribute to each participant.

Here, Mr. Bass' sentence was based on methamphetamine, albeit the harsher drug penalty, which resulted in a term of imprisonment which exceeded the five-year maximum allowable under § 841(b)(1)(D) or § 812.

Having established that the two drugs involved in Mr. Bass' drug conspiracy were different and treated differently under both the statutory scheme and federal sentencing guidelines, it is evident that former trial counsel should have objected at the penalty phase to the court's

sentencing him with respect to methamphetamine instead of amphetamine after the jury had returned a general verdict on the conspiracy count.

Counsel Rendered Ineffective Assistance By Failing To Object To The Court's Sentencing Him With Respect To Methamphetamine Instead Of Amphetamine After Jury Returned a General Verdict.

The standards which must be applied in determining what constitutes ineffective assistance of counsel are set forth in *Strickland v. Washington*, 466 U.S. 688 (1984). This Court in *Strickland* held that "the proper standard of attorney performance is that of reasonably effective assistance," and that the burden is on the defendant to demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.*, at 687-88.

In determining whether the defendant has met his burden:

> A Court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable judgment. The court must then determine whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Id. at 690.

The "burden of proof for showing ineffective assistance of counsel is, and remains on petitioner throughout a habeas corpus proceeding." *Roberts v. Wainwright*, 666 F.3d 517, 519 (11th Cir. 1982); *Jones v. Kemp*, 678 F.2d 929, 932 (11th Cir. 1982). The petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, at 694. Trial counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in exercise of reasonable professional judgment." *Id.* at 688-90.

A defendant has the constitutional right to the assistance of counsel at every "critical stage of a proceeding against him or whenever his substantial rights . . . may be affected." *Mempha v. Rahe*, 389 U.S. 128, 134 (1967). Further, a defense counsel is under an obligation to familiarize himself with the facts and law applicable to his client's criminal case. *Correale v. United States*, 479 F.2d 944 (1st Cir. 1973). "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. Counsel has been found to be ineffective for failing to argue sentencing issues that *may* have resulted in different and more favorable sentence. *See, United States v. Ford*, 918 F.2d 1343, 1350 (8th Cir. 1990) (held counsel's failure to argue for acceptance of responsibility in light of commentary which could have provided the defendant with the reduction, denied defendant a fair sentencing); *United States v. Headley*, 923 F.2d 1079, 1084 (3rd Cir. 1991) (held ineffective assistance where counsel failed to argue for a reduction for a minor role in the offense, given the court's willingness to consider such an adjustment).

The drugs in the instant case were not similar but rather treated differently under the applicable statute and sentencing guidelines. This Court's decision in *Edwards, supra,* clearly put counsel on notice of what unambiguous, albeit constitutional, concerns this Court had with respect to sentencing a defendant, like Mr. Bass, with respect to two different drugs which would cause the imposition of a sentence beyond the statutory maximum. There was simply no reasonable or discernible strategic reason on part of counsel to forego objecting to the court's sentencing Mr. Bass with respect to methamphetamine instead of amphetamine given the jury's return of a general verdict.

Therefore, under the facts of this case counsel should have objected to the court's sentencing Mr. Bass based on methamphetamine in the absence of a special verdict, and his failure to do so resulted in prejudice to Mr. Bass. Having proven both prongs under *Strickland*, Mr. Bass respectfully submits the opinions of the courts below are contrary to the decisions of this Court in *Strickland* and *Edwards*, warranting the habeas relief requested below – Mr. Bass submits that the petition for writ of certiorari is due to be granted, the judgments below vacated, and a remand is necessary for purposes of re-sentencing.

CONCLUSION

WHEREFORE, Danny K. Bass, PETITIONER, requests this Court to grant the instant petition based on the foregoing argument and law; and enter an order granting same and other relief this Court deems proper and just.

Respectfully submitted,

DANNY K. BASS
FCC-COLEMAN (LOW)
P.O. Box 1031
Coleman, FL 33521-1031

Petitioner.

APPENDIX A

FOR THE ELEVENTH CIRCUIT

No. 01-13260
Non-Argument Calendar

D.C. Docket Nos. 00-000036-CV-CV-3-LAC
and 96-00093-CR-3-L

DANNY K. BASS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Florida

(April 22, 2002)

Before BLACK, BARKETT, and MARCUS, Circuit Judges.

PER CURIAM:

Danny K. Bass appeals the district court's denial of his federal habeas petition brought pursuant to 28 U.S.C. § 2255. Bass was indicted on the following charge:

> Count 1: That . . . the defendants did knowingly and willfully combine, conspire, confederate, agree, and have a tacit understanding with each other and other persons, to knowingly and intentionally possess with intent to distribute the controlled substance methamphetamine and amphetamine, in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(A)(viii) and

841(b)(D). All in violation of Title 21, United States Code, Section 846.[1]

Section 841(a)(1) makes it unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). Section 841(b)(1)(A)(viii) states that upon a finding of a violation of section 841(a)(1) involving "50 grams or more of methamphetamine" the court shall issue a sentence of "a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall not be less than 20 years or more than life." 21 U.S.C § 841(b)(1)(A)(viii). Section 841(b)(D) does not exist.[2]

The jury returned a general verdict, finding Bass guilty of Count 1, without ascertaining which illegal substance Bass had possessed or in what quantity. The trial court sentenced Bass to 188 months, and this Court subsequently affirmed the conviction. Bass then filed the instant petition for writ of habeas corpus, alleging that his trial counsel had rendered ineffective assistance by failing to object to the sentence. The district court denied the writ, concluding the Bass' trial counsel had not rendered ineffective assistance by failing to object to the sentence,

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[1] Bass was also charged separately with possession of a machine gun.

[2] 21 U.S.C. 841(b)(1)(D), however, states that

> In the case of . . . any controlled substance in schedule III . . . such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years.

because the sentence fell under the twenty-year maximum allowable penalty established by 21 U.S.C § 841(b)(1)(C) for possession of a "Schedule II" substance.[3] There is no dispute that amphetamine is a Schedule II substance. Bass now appeals, arguing his counsel was ineffective for failing to object, and that he should not have been sentenced to a term above for the five-year maximum allowed under 21 U.S.C § 841(b)(1)(D) for Schedule III substances.

To succeed on an ineffective assistance of counsel claim, a petitioner must demonstrate that counsel's actions were unreasonable, and that the petitioner suffered prejudice as a result. *See Strickland v. Washington*, 466 U.S. 668 (1984). It is clear that Bass can satisfy neither *Strickland* prong. "Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error did not mislead the defendant to the defendant's prejudice." Fed. R. Crim. P. 7(c)(3). We have previously explained that if the indictment sets out the elements of an offense, a defendant is not prejudiced under Rule 7 by the citation of the wrong statutory section for that offense. *See, e.g., United States v. Elgersma*, 971 F.2d 690, 691 n.1 (11th Cir. 1992) (en banc) (adopting the panel's reasoning at 929 F.2d 1538, 1540); *United States v. Chatham*, 677

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[3] Section 841(b)(1)(C) of a controlled substance in schedule I or II . . . such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life.

F.2d 800, 803 (11th Cir. 1982); *United States v. Rowan*, 663 F.2d 1034, 1035 (11th Cir. 1981).

In this case, Bass was charged with conspiring "to knowingly and intentionally possess with intent to distribute the controlled substance methamphetamine and amphetamine." His 188-month sentence falls below the relevant maximum allowable prison sentences of either life for methamphetamine under section 841(b)(1)(A)(viii), or twenty years for amphetamine under section 841(b)(1)(C). Under Fed. R. Crim. P. 7(c)(3) and pertinent Eleventh Circuit precedent, it would therefore have been without merit for Bass' counsel to argue that the government's incorrect statutory citation should have limited Bass' sentence to five years. Accordingly, the failure to object was neither unreasonable nor prejudicial.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs. Case No: 3:96cr93/LAC
3:00cv36/LAC/MD

DANNY K. BASS

ORDER

Upon consideration of the Report and Recommendation of the Magistrate Judge filed on July 20, 2000 and the Second Report and Recommendatoin filed on March 30, 2001, pursuant to 28 U.S.C. § 636(b)(1)(B), and after reviewing objections to the Recommendation, the Recommendations are adopted as the opinion of the Court.

Accordingly, it is ORDERED:

That the motion to vacate, set aside or correct judgment and sentence (doc. 155) is DENIED for the reasons set forth in the court's report and recommendations dated March 30, 2001 (doc. 170) and July 20, 2000 (doc. 165).

DONE AND ORDERED this 11th day of April, 2001.

/s/ Lacey A. Collier
LACEY A. COLLIER
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs. Case No: 3:96cr93/LAC
3:00cv36/LAC/MD

DANNY K. BASS

REPORT AND RECOMMENDATION

This matter is before the court upon a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (doc. 155). The government has filed a response (doc. 161) and the movant has filed a reply (doc. 164). The matter is referred to the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636 and N.D. Fla. Loc. R. 72.2(B). After a careful review of the record and the arguments presented, it is the opinion of the undersigned that defendant has not raised any issue requiring an evidentiary hearing, Rules Governing Section 2255 Cases 8(a) and (b), and that the motion should be granted in part and denied in part, as set forth herein.

I. BACKGROUND

Movant was named in a two count indictment charging him with conspiracy to possess with intent to distribute methamphetamine and amphetamine in violation of 21 U.S.C. § 841, and possession of a machine gun in violation of 18 U.S.C. § 922(o)(1). The drug charge stemmed from movant's involvement in a multi-member conspiracy that

distributed methamphetamine transported to the Pensacola area from the state of Arizona, and the gun charge arose from a weapon seized from a safe in movant's home. Movant was initially represented by retained counsel Barry Beroset, but retained William B. Richbourg after Beroset discovered a conflict of interest. Following a jury trial at which he did not testify, movant was convicted as charged. He was sentenced to a term of 188 months imprisonment on count 1, and 120 months concurrent on count 2, as well as a five year term of supervised release. His convictions were affirmed by the Eleventh Circuit Court of Appeals on December 11, 1998.

In the present motion, movant contends that counsel was constitutionally ineffective during both the trial and sentencing phases of his case. Specifically, he contends that (1) his sentence was imposed in violation of his constitutional rights because it was based on a general verdict in a multi-object conspiracy, (2) counsel failed to advise him whether to plead guilty or proceed to trial, (3) counsel failed to request a severance of the charges, and (4) counsel's trial strategy was so frivolous and wholly without merit that it constituted deficient performance which resulted in prejudice to the movant. The government opposes the motion entirely.

II. TIMELINESS OF THE MOTION

As an initial matter the court briefly considers the timeliness of the petition. As noted previously, the appellate mandate issued in movant's case on December 12, 1998. He therefore had until March 11, 1999 in which to file a petition for certiorari with the Supreme Court, although he did not do so. Movant argues that to have

been timely filed, the instant motion must have been filed within one year of the latter date, and that therefore his February 1, 2000 motion was timely. The government takes the position that the movant's conviction became final on December 12, 1998 since he chose not to seek certiorari review, and therefore the motion should be dismissed as untimely.

This court has taken both positions in the past. In a report and recommendation issued on August 19, 1998,[1] Magistrate Judge Susan Novotny found that movant's conviction did not become final until 90 days after the Court of Appeals filed its mandate, even though the movant did not seek certiorari review. Then, the undersigned entered a report and recommendation on October 8, 1998,[2] citing a Seventh Circuit opinion issued on August 20, 1998,[3] finding that the movant's conviction became final on the date that the Eleventh Circuit issued its mandate where the movant did not file a petition for certiorari. In the latter case, the motion would have been untimely under either interpretation.

There is appellate case law in support of both positions. Since *Gendron*, however, only one other appellate court has supported the Seventh Circuit's reasoning. *See United States v. Torres,* 211 F.3d 836, 837 (4th Cir. 2000). In *United States v. Adams*, 173 F.3d 1339 (11th Cir. 1999), the court recognized the split in authority but did not decide the question of when a conviction becomes final

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[1] *United States v. Kenneth Springfield,* 3:94cr05026, 5:97cv120.

[2] *United States v. Elvis Augustus White,* 3:94cr03066, 3:98cv219

[3] *Gendron v. United States,* 154 F.3d 672 (7th Cir. 1998).

because the petitioner's motion was untimely under either interpretation. The majority of the courts to have ruled on the issue favor the movant's position that the conviction does not become final until the time for filing a petition for certiorari has elapsed, regardless of whether such a petition is actually filed. *See e.g., United States v. Burch,* 202 F.3d 1274, 1276 (10th Cir. 2000); *United States v. Garcia,* 210 F.3d 105, 1061 (9th Cir. 2000); *Kapral v. United States*, 166 F.3d 565, 571 (3rd Cir. 1999); *United States v. Gamble*, 208 F.3d 536, 537 (5th Cir. 2000). Cf. *Myers v. United States*, 198 F.3d 615, 618 (6th Cir. 1999) (citing *Allen v. Hardy*, 478 U.S. 225, 258 n.1, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986)); *see also United States v. Hall*, TCR 93-04073, 4:97cv274 (Senior Judge William Stafford of this court concluding that a conviction is final when it is no longer subject to examination on direct review, ie. When the defendant can no longer petition the Supreme Court for certiorari review). Unlike many cases, the 90 day difference in when the movant's conviction became final will directly affect the timeliness of the instant motion. Absent any guidance from the Eleventh Circuit, this court is inclined to recommend that this court follow the majority view and find that a judgment of conviction becomes final only after the time for filing a petition for certiorari has expired. This position would not "disrupt settled precedent by requiring that a criminal defendant pursue collateral relief before the time for seeking direct review expires and during that time period in which he or she may rightfully be considering the wisdom of further direct review." *United States v. Thomas*, 203 F.3d 350, 354 (5th Cir. 2000), *cited in Torres*, 211 F.3d at 846 (4th Cir. 2000) (Hamilton, dissenting). Having concluded that the motion was timely filed, the court now proceeds to merits review of movant's claim.

III. LEGAL ANALYSIS

Ineffective assistance of counsel claims are properly raised by a § 2255 motion. *United States v. Jiminez*, 983 F.2d 1020, 1022, n.1 (11th Cir. 1993). To show a violation of his constitutional right to counsel, movant must demonstrate that counsel's performance was below an objective and reasonable professional norm and that he was prejudiced by this inadequacy. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d (1984). In applying *Strickland*, the court may dispose of an ineffective assistance of claim if the movant fails to carry his burden on either of the two prongs. *Id.* At 697, 104 S.Ct. at 2069.

In determining whether counsel's conduct was deficient, this court must, with much deference, consider "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688, 104 S.Ct. at 2065; see *Atkins v. Singletary*, 965 F.2d 952 (11th Cir. 1992). "[R]eviewing courts must indulge a strong presumption that counsel's conduct fell within the wide range of reasonably professional assistance." *Yordan v. Dugger*, 909 F.2d 474, 477 (11th Cir. 1990) (citing *Harich v. Dugger*, 844 F.2d 1464, 1469 (11th Cir. 1988); *Lancaster v. Newsome*, 880 F.2d 362 375 (11th Cir. 1989) (emphasizing that petitioner was "not entitled to error-free representation")).

With regard to the prejudice requirement, movant must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland,* 466 U.S. at 694. For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for

counsel's error may grant the defendant a windfall to which the law does not entitle him." *Lockhart v. Fretwell*, 506 U.S. 364, 369-70, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). Movant therefore must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lockhart*, 506 U.S. at 369 (quoting *Strickland,* 466 U.S. at 687). Or in the case of alleged sentencing errors, movant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been significantly less harsh due to a reduction in the defendant's offense level. *United States v. Camargo-Vergara*, 57 F.3d 993, 997-998 (11th Cir. 1995); *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993).

Finally, to establish ineffective assistance, movant must provide factual support for his contentions regarding counsel's performance. *Smith v. White*, 815 F.2d 1401, 1406-07 (11th Cir.), *cert. Denied*, 484 U.S. 863, 108 S.Ct. 181, 98 L.Ed.2d 133 (1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991); *Stano v. Dugger*, 901 F.2d 898, 899 (11th Cir. 1990) (citing Blackledge, 431 U.S. at 74, 97 S.Ct. at 1629).

1. Failure to specifically identify controlled substance

Movant's first claim is essentially that counsel was ineffective for failing to object to the court's sentencing him with respect to methamphetamine instead of amphetamine after the jury returned a general verdict. He states that he was prejudiced because had counsel made such an objection, his sentence would have been no greater than five years on the conspiracy count.

The indictment charged movant and his co-defendants with conspiracy to possess with intent to distribute methamphetamine and amphetamine in violation of title 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii) and 841(b)(1)(D).[4] Title 21 U.S.C. § 841 (b)(1)(A)(viii) provides that for violations involving 50 grams or more of methamphetamine, an offender shall be sentenced to a term of imprisonment which may not be less than ten (10) years or more than life, and if death or serious bodily injury results from the use of such substance to a term not less than twenty (20) years or more than life.[5] Section 841(b)(1)(D) provided that in the case of a violation involving any controlled substance in schedule III,[6] an offender shall be sentenced to a term of imprisonment of not more than five (5) years, unless the person has a prior conviction for a felony for a drug offense, in which case the penalty shall be a term of imprisonment of not greater than ten (10) years.[7]

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[4] Where the language of a statute proscribes several means by which the defendant might have commited a violation, the government may plead the offense conjunctively and satisfy its burden of proof by any means." *United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir. 1996) (citation omitted).

[5] The base penalty for offenses involving 5 grams or more of methamphetamine is not less than five (5) years and not more than forty (40).

[6] Amphetamine, its salts, optical isomers and salts of its optical isomers are listed in Title 21 U.S.C. § 812, Schedule III(a)(1).

[7] The sentencing guidelines also calculate the penalties for methamphetamine more severely than for amphetamine: one gram of methamphetamine equals two kilograms of marijuana while one gram of amphetamine is equivalent to only 200 grams of marijuana.

There was ample witness testimony at trial about the defendants' involvment with methamphetamine.[8] The court's instructions to the jury included a summary of the charges in the indictment, but the court did not instruct the jury as to the chemical difference between methamphetamine and amphetamine or instruct the jury that it had any responsibility as far as determining the identity of the controlled substance (doc. 116 at 7-8). As reflected on the verdict form, the jury found movant "guilty of the offense of conspiracy to possess with intent to distribute a controlled substance as charged in Count I." (Doc. 102 at 228). The identity of the controlled substance was not specified.

The probation officer prepared a PSR and determined that movant's adjusted offense level, based on 22 pounds of methamphetamine,[9] was 36. Movant's sentencing guidelines range was 188 to 235 months. He received a sentence of 188 months on the conspiracy charge, the low end of the guidelines range, due to the lack of any aggravating circumstances (doc. 103 at 21).

Movant now contends that because the jury returned a general verdict that did not specify which of the two controlled substances identified in the indictment was the basis for its finding of guilt, he must be sentenced as if the

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[8] See testimony of Daniel Howard, Dolores Howard, Frank Brown, Charles Walther, John English, and Presley Morrison.

[9] The PSR stated that a lab report confirmed that one sample of the drug seized was amphetamine (PSR at ¶ 10), although consistently throughout the report the drug is identified as methamphetamine. Movant thus argues that much of the trial testimony concerning "methamphetamine" could have been an error.

conspiracy involved distribution only of the drug carrying the lower penalty, in this case amphetamine. *See United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2nd Cir. 1984) (sentence of defendant charged in marijuana and cocaine conspiracy and who was sentenced to a term in excess of the statutory maximum for marijuana-related conspiracies was improper because the general jury verdict did not reveal whether the jury had found defendant guilty of a cocaine-related or a marijuana-related conspiracy); *United States v. Barnes*, 158 F.3d 662, 668 (2nd Cir. 1998); *Newman v. United States*, 817 F.2d 635 (10th Cir. 1987); *United States v. Owens*, 904 F.2d 411, 414-15 (8th Cir. 1990); *United States v. Bounds*, 985 F.2d 188, 194-95 (5th Cir. 1993); *United States v. Garcia*, 37 F.3d 1357, 1369-71 (9th Cir. 1994).

In *United States v. Edwards*, 105 F.3d 1179, 1180 (7th Cir. 1997), aff'd, 523 U.S. 511, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998), the Seventh Circuit rejected the reasoning of the cases upon which movant relies. *Edwards* involved a charged conspiracy to distribute cocaine or cocaine base in which the jury returned a general verdict of guilty. The judge found that the conspiracy had involved both cocaine and crack cocaine, and he imposed sentence accordingly. Appellants argued that because the jury charge used the disjunctive "or," the judge was wrong to assume that crack cocaine had been involved. The Seventh Circuit recognized the decisions of the other five appellate courts cited above, but found them to be "wrong," because "under the Sentencing Guidelines, the judge alone determines which drug was distributed, and in what quantity." 105 F.3d at 1180 (citing *Witte v. United States*, 515 U.S. 389, 115 S.Ct. 2199, 2207-08, 132 L.Ed.2d 351 (1995); *United States v. Cooper*, 39 F.3d 167, 172 (7th Cir. 1994); *United States v. Levy*, 955

F.2d 1098, 1106 (7th Cir. 1992); U.S.S.G. § 1B1.2(d) & Application Note 5). In affirming the Seventh Circuit's decision the Supreme Court stated:

> "[w]e agree that in the circumstances of this case the judge was authorized to determine for sentencing purposes whether crack, as well as cocaine, was involved in the offense-related activities. The Sentencing Guidelines instruct the judge in a case like this one to determine both the amount and the kind of "controlled substances" for which a defendant should be held accountable – and then to impose a sentence that varies depending upon amount and kind. Consequently, regardless of the jury's actual, or assumed, beliefs about the conspiracy, the Guidelines nonetheless require the judge to determine whether the "controlled substances" at issue – and how much of those substances – consisted of cocaine, crack, or both. And that is what the judge did in this case.

Id. 523 U.S. at ___, 118 S.Ct. at 1477 (internal citations omitted). The Court further noted that the Guidelines instruct a sentencing judge to base a drug-conspiracy offender's sentence on the offender's "relevant conduct," and that this can include conduct that is outside of the offense of conviction, but is part of the "same course of conduct or common scheme or plan." *Id.* citing U.S.S.G. §1B1.3(a)(1) and (2). Therefore, the Court reasoned that under the facts before it, so long as both controlled substances were part of either the offense of conviction or the same course of conduct, the Guidelines sentencing range would be identical. *Id.* The Court acknowledged that a statutory and constitutional claim could arise if the sentence of a defendant in a multi-substance conspiracy

exceeded the maximum permitted by statute for a conspiracy involving only one of the substances, "because a maximum sentence set by statute trumps a higher Guidelines sentence." 118 S.Ct. at 1477. This situation did not arise in *Edwards*, as the defendants' sentences were within the statutory limits applicable to a conspiracy involving only cocaine, the substance with the lesser penalties, given the quantities of that drug attributable to each participant.

Since *Edwards*, there has been one Eleventh Circuit decision addressing this issue, *United States v. Riley*, 142 F.3d 1254 (11th Cir. 1998), which was cited by neither party. The defendants in *Riley* were indicted for conspiracy to possess with intent to distribute crack and powder cocaine in violation of 21 U.S.C. § 841(a). After being instructed that it could convict if it found a conspiracy to "possess cocaine and cocaine base with the intent to distribute," the jury returned a general verdict of guilty. Neither defendant requested a special verdict to identify which substances were involved in the offenses. Defendants were then sentenced according to the amounts of powder and crack attributed to them by their presentence reports.

On appeal, defendants challenged their sentences based on the absence of a special verdict or a finding beyond a reasonable doubt on whether the offenses involved powder cocaine, crack cocaine or both. They argued that because the indictment permitted conviction for a drug offense involving either powder or crack cocaine, the absence of the special verdict required the district court to impose a sentenced based only upon the drug yielding the lower sentence. 142 F.3d at 1256. Relying on *Edwards* and applying the plain error standard, the Eleventh Circuit

found that there was no error because the sentencing court was permitted to take into account both offense conduct and relevant conduct in imposing sentence. The court acknowledged pursuant to *Edwards*, that if the amount of one substance leads to a lower statutory maximum sentence than would apply to the amount of the other substance, the sentencing court must stay below the lower statutory maximum. 142 F.3d at 1256; *see also United States v. Dale*, 178 F.3d 429, *433 (6th Cir. 1999). However, as in *Edwards*, the exception was inapplicable since both defendants in that case "generously exceeded the amounts required to make them eligible for life sentences" regardless of which substance was used for sentencing. *Riley*, 142 F.3d at 1256; *see also United States v. Stephenson*, 183 F.3d 110, 119 (2nd Cir. 1999).

The Government relies in this case on the fact that the overwhelming testimony at trial was that the substance the defendants conspired to distribute was methamphetamine. This testimony came from six government witnesses, all of whom were "intimately familiar" with methamphetamine as suppliers, distributors or users. Identification of a controlled substance in the Eleventh Circuit may be established by circumstantial evidence including "lay experiences based on familiarity through prior use, trading, or law enforcement; a high sales price; on-the-scene remarks by a conspirator identifying the substance as a drug; and behavior characteristic of sales and use, such as testing, weighing, cutting and peculiar ingestion." *United States v. Baggett*, 954 F.2d 674, 677 (11th Cir. 1992) (quoting *United States v. Harrell*, 737 F.2d 971, 978 (11th Cir. 1984)); *U.S. v. Leavitt*, 878 F.2d 1329, 1336 (11th Cir. 1989). The government further asserts that counsel was not ineffective for failing to challenge the

sentencing court's dtermination of the identity of the controlled substance, when such a challenge would have been futile based on the testimony presented. *Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992).

Had the jury returned a special verdict; or had the sentences for the two substances alleged in the indictment been similar, the government's position would be persuasive. Although the evidence presented at trial clearly tended to show that the conspiracy involved primarily, if not exclusively, methamphetamine, both methamphetamine and amphetamine were charged in the indictment. Notwithstanding the evidence adduced at trial, based on the authority of *Edwards* and *Riley*, it appears that the sentence on Count I, which was in excess of the five year statutory maximum under 21 U.S.C. § 841(b)(1)(D) for offenses involving amphetamine was in error. Therefore, under the facts of this case counsel should have objected to the court's sentencing movant based on methamphetamine in the absence of a special verdict, and his failure to do so resulted in prejudice to the movant. The motion to vacate should be granted as to this issue, and movant's case should be scheduled for resentencing.[10] In the alternative, the court may wish to give the government a choice of

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[10] Additionally, the United States Supreme Court recently held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, ___ S.Ct. ___, 2000 WL 807189 (June 26, 2000). Under the facts of this case, it could be argued that the fact of movant's participation in a methamphetamine conspiracy must be proved beyond a reasonable doubt before he can be sentenced to a penalty in excess of the statutory maximum for amphetamine.

having the movant resentenced to a maximum five-year term on the conspiracy count or having this conviction vacated and the case re-tried on that count only. *See Orozco-Prada, supra; United States v. Barnes,* 158 F.3d 662, 674 (2nd Cir. 1998).

2. Failure to Advise defendant how to plead

"[O]ne of the most precious applications of the Sixth Amendment may well be in affording counsel to advise a defendant concerning whether he should enter a guilty plea." *Childress v. Johnson*, 103 F.3d 1221, 1227 (5th Cir. 1997). Movant purportedly admitted to counsel that he sold durgs to some of the named cooperating witnesses, although this admission was not made to the probation officer. And he asserts that prior to trial he told counsel he believed he was not guilty of the possession of a machine gun charge, since the weapon had not been rendered fully automatic. Movant now complains that his retained attorney failed to advise him on his plea decision, offering no advice as to whether movant could plead guilty on one account and proceed to trial on the other, or whether a guilty plea on both counts might have been in order due to movant's possession of the parts to build the machine gun. Movant contends that counsel's lack of advice amounted to ineffective assistance of counsel because had he been properly advised, he would have pleaded guilty to the charged offense, resulting in a three level reduction for acceptance of responsibility.[11] The fact that he did not

[11] This portion of the movant's memorandum refers to an affidavit he purportedly signed. The affidavit in question was not part of the court file in this case, although it was apparently appended to the

(Continued on following page)

receive this reduction after going to trial demonstrates prejudice, movant argues, since if he had pleaded guilty he would have received a lesser sentence. *Citing Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995).

Counsel contradicts movant's accusations in his affidavit, stating that he discussed movant's plea with him early in the case. He told the movant that he would receive a guidelines sentence whether he pleaded guilty or went to trial. Counsel further states that he told the movant that no three level reduction for acceptance of responsibility would be forthcoming because although movant had purportedly attempted to cooperate, the government chose not to believe his story.[12] Of course, by proceeding to trial movant retained hope of an acquittal. The government argues that the decision to go to trial hoping for an acquittal or jury pardon was a tactical move.[13]

The PSR reflects the movant admitted purchasing methamphetamine, but denied that he was a dealer or that he had ever sold any methamphetamine in the Milton, Florida area, as alleged by the government. (PSR at ¶ 30). The court surmises from the limited nature of movant's admission even after hearing the evidence

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pleadings served on the government. Counsel for the movant was notified of this deficiency and requested to submit another copy via facsmile, but as of the date of this recommendation, had failed to comply with the court's request.

[12] It is not clear from his statement whether counsel has confused acceptance of responsibility with substantial assistance.

[13] At sentencing, counsel noted that after the Rule 11 deal went out, his client had no alternative but to go to trial and that he could not have, in good conscience, let him plead straight up in this situation.

adduced against him at trial, that the district court may have found that there was no factual basis for a guilty plea. Furthermore, a "timely" plea does not automatically yield an acceptance of responsibility reduction. *See United States v. Anderson*, 23 F.3d 368, 369 (11th Cir. 1994); *United States v. Paslay*, 971 F.2d 667, 675 (11th Cir. 1992). In this case movant never fully admitted responsibility for the relevant conduct. At sentencing, counsel nonetheless objected to the probation officer's denial of the acceptance of responsibility reduction, citing movant's attempts at cooperation with the government (doc. 103 at 6-10). The government noted in response that the movant continued to deny his involvement in the conspiracy, and that his overtures toward cooperation excluded provision of information about his and his brother's illicit activities. Movant's objection was overruled at sentencing (doc. 103 at 11).

Because counsel's affidavit reflects that he did discuss movant's plea options with him, and because movant's failure to admit to his role in the conspiracy likely would have precluded either a guilty plea or an acceptance of responsibility reduction, he has not shown deficient performance or prejudice and he therefore is not entitled to relief on this ground.

3. Failure to request severance

Movant next argues that he was prejudiced by the joinder of counts 1 and 2 of the indictment. He argues that he was precluded from testifying in his own behalf on the gun count since he would have subjected himself to cross-examination on the drug charges had he taken the stand. He

states that he would have testified that he had not finished making the firearm into a fully automatic device, but that someone other than him had altered a certain part of the trigger mechanism to make the firearm fully automatic. He contends that this testimony would have been corroborated by a tape produced by the government that was played to the jury. The tape showed an agent firing the weapon, which initially did not fire as fully automatic. There was a break in the tape, and then the agent fired the weapon again, this time in fully automatic mode.

Movant also relies on Rule 8(a), misjoinder. He claims that the two offenses, the drug conspiracy and possession of the automatic weapon, were not part of a common scheme or plan. In the alternative, he states that a motion for a Rule 14 severance was proper and would have been granted in his case since he was prejudiced by the joinder of offenses.

Motions for severance and supporting memoranda of law were filed by both movant and his co-defendant before trial (doc. 43 & 45, doc. 49 & 50). The motions were denied by current Chief Judge Roger Vinson (doc. 46 & 60), and shortly thereafter the case was reassigned to Judge Lacey Collier. At trial, the court incorrectly noted that no motion for severance had been filed and was corrected by counsel (doc. 102 at 105). After seeming to state that the motion should have been granted, the court later clarified that this had been a misstatement (doc. 102 at 105, 180).

The trial court's refusal to sever the counts was raised and argued on appeal. In his appellate brief, movant argued that the prejudice he suffered by the court's refusal to sever the counts did not become apparent until later in

the trial. Government's witness Richard Craze of the Bureau of Alcohol, Tobacco, and Firearms testified that an American citizen can legally possess a machine gun under certain circumstances (doc. 102 at 143-144). Counsel moved for a judgement of acquittal contending that the burden of proof must be on the government to prove the possession was illegal. The trial court denied the motion, ruling that "legal possession" was an affirmative defense such that it was defendant's burden to prove that his possession came within the exception to the statutory prohibition (doc. 102 at 182 citing *United States v. Gonzalez,* 121 F.3d 928 (5th Cir. 1997); *United States v. Just,* 74 F.3d 902 (8th Cir. 1996)). Movant argued on appeal that he would have taken the stand in an effort to establish the affirmative defense of legal possession,[14] but that he was prevented from doing so because he would have been forced to testify about his participation in the drug conspiracy. Movant now argues that counsel's belated argument on appeal that a motion to sever should have been granted did not excuse the deficient performance.[15]

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[14] In the instant motion he claims that he either would have testified that the weapon had not yet been rendered fully automatic or he would have entered a plea of guilty, since possession of the weapon parts was sufficient to sustain a conviction (although severance would not affect a guilty plea). In his affidavit, counsel provides yet another possible position: that movant would have testified that had he been able to render the weapon automatic, he would have applied for the proper license.

[15] Movant includes a full page of argument about an attorney's failure to file an appeal and his case entitlement to an appeal, which is most perplexing to the court since clearly an appeal was taken in this case.

In rejecting movant's argument, the Eleventh Circuit noted that a motion to sever is reviewed for abuse of discretion and will not be reversed unless the joint trial causes the defendant "compelling prejudice." (Doc. 161, exh. B at 3, citing *United States v. Hernandez,* 921 F.2d 1569, 1578 (11th Cir. 1991)). The court concluded that movant's case was a simple criminal case involving two counts and two defendants, and that the defendants failed to show that the jury was unable to follow the instructions to consider the evidence for each count and each defendant separately or that either defendant was prejudiced by the joint trial. (Doc. 161 exh. B at 3, citing *United States v. Francis*, 131 F.3d 1452, 1458-59 (11th Cir. 1997)).

The law is well established that district court need not reconsider issues raised in a section 2255 motion which have been resolved on direct appeal. *Mills v. United States*, 36 F.3d 1052, 1056 (11th Cir. 1994), *cert. denied*, 514 U.S. 1112, 115 S.Ct 1966, 131 L.Ed.2d 856 (1995); *United States v. Hobson,* 825 F.2d 364, 366 (11th Cir. 1987), vacated on other grounds, 492 U.S. 913, 109 S.Ct. 3233, 106 L.Ed.2d 581 (1989); *United States v. Rowan*, 663 F.2d 1034, 1035 (11th Cir. 1981). Broad discretion is afforded to a court's determination of whether a particular claim has been previously raised. *Sanders v. United States*, 373 U.S.1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) ("identical grounds may often be proved by different factual allegations . . . or supported by different legal arguments . . . or couched in different language . . . or vary in immaterial respects"). Furthermore, a motion to vacate under section 2255 is not a substitute for direct appeal, and issues which could have been raised on direct appeal are generally not actionable in a section 2255 motion and will be considered procedurally barred. *See Bousley v. United States*, 523 U.S. 614,

118 S.Ct. 1604, 1610, 140 L.Ed.2d 828 (1998); *Mills,* 36 F.3d at 1055 (recognizing that a ground is "available" on direct appeal when "its merits can be reviewed without further factual development"); *United States v. Frady*, 456 U.S. 152, 165, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Movant may not relitigate claims that have been resolved on appeal under the guise of an ineffective assistance of counsel claim. Additionally, if, as movant now admits in his memorandum in support of his motion to vacate, he possessed the parts necessary to cause a firearm to operate "fully automatic," he was guilty of the charged offense and was not prejudiced by his conviction.[16]

4. Failure to follow sound trial strategy

As his final ground for relief, movant states that counsel's trial strategy was so frivolous and wholly without merit that it constituted deficient performance resulting in prejudice. He claims that counsel had no trial strategy and that he went to trial with no defense. Movant states that he told counsel he was guilty of the drug trafficking offense and that he possessed parts necessary to cause the firearm to operate fully automatic, which as a matter of law was also an admission of guilt. Movant explains that he wanted to contest the weapon charge because the gun in question was not totally operational as

[16] The government argues that because movant received a concurrent sentence on this count that was shorter than the sentence on count 1, he was not prejudiced. This argument alone is unpersuasive in light of the court's finding that movant is entitled to resentencing on count 1, and also ignores the possibility of collateral consequences of a weapons conviction.

a fully automatic weapon, and counsel had told him that this was a viable defense. Counsel's advice was mistaken, movant states, as mere possession of machine gun parts brings liability under the statute, and hence, he had no defense at all.[17] He claims that even the court made a comment on the lack of viable defense, stating "if that's the only defense you've got, God help your client." (Doc. 102 at 106, lines 8-10, and at 108, lines 17-18). It is clear from the record, however that this remark was actually directed towards counsel for movant's co-defendant rather than movant's attorney.

Counsel states in his affidavit that he was fully aware that possession of the appropriate parts to make a machine gun was sufficient to support a § 922(o) conviction. However, if the parts were supposed to make the gun work and they did not, there would be no machine gun. Counsel opined that there was an issue for the jury as to whether the movant, who was by trade a hog farmer, could properly assemble the parts to create a machine gun even if the firearms experts at the government crime lab were able to do so. Counsel refers to the videotape of the agent firing the weapon, in which the weapon initially does not function fully automatic, but later is shown to fire fully automatic mode.

Movant does not suggest what other trial strategy should have been pursued by his attorney. The court finds that counsel's trial strategy was not so devoid of reason to

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[17] This assertion is inconsistent with movant's claim that he would have testified to establish an affirmative defense had he been able to do so without subjecting himself to cross-examination on the drug charges.

warrant a finding that counsel's performance was deficient. Furthermore, on the record before the court prejudice cannot be presumed since movant's adamant refusal to admit the full extent of his role in the charged drug conspiracy would likely have precluded his receiving an acceptance of responsibility reduction, even if a guilty plea was accepted.

Based on the foregoing, it is respectfully RECOMMENDED:

The motion to vacate, set aside, or correct sentence (doc. 155) be GRANTED as to movant's first ground for relief and movant's case be scheduled for resentencing, and that the motion be DENIED on grounds 2 through 4.

At Pensacola, Florida this 20th day of July, 2000.

/s/ Miles Davis
MILES DAVIS
UNITED STATES
MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Any objections to these proposed findings and recommendations must be filed within ten days after being served a copy thereof. A copy of objections shall be served upon the magistrate judge and all other parties. Failure to object may limit the scope of appellate review of factual findings. *See* 28 U.S.C. § 636; Local Rule 27(B); *United States v. Roberts,* 858 F2d 698, 701 (11th Cir. 1988).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs. Case No: 3:96cr93/LAC
3:00cv36/LAC/MD

DANNY K. BASS

ORDER and
SECOND REPORT AND RECOMMENDATION

Movant filed a motion to vacate raising four grounds for relief on February 2, 2000. After the government responded, on July 20, 2000 this court recommended that the movant be resentenced based on his claim that counsel was ineffective for failing to object to the court's sentencing him with respect to methamphetamine instead of amphetamine after the jury returned a general verdict (doc. 165). Neither party objected to the court's recommendation. However, after sua sponte revisiting its previous recommendation, the court finds that its determination that movant was entitled to relief on this ground was in error and that the motion to vacate should be denied in its entirety.

Central to the court's previous recommendation was its determination that amphetamine was a Schedule III controlled substance pursuant to § 21 U.S.C. § 812 and that violations involving amphetamine were punishable as

set forth in 21 U.S.C. § 841(b)(1)(D).[1] Although the 21 U.S.C. § 812 still lists amphetamine as a Schedule III controlled substance, the applicable and controlling federal regulations were amended in 1971 to list amphetamine as a Schedule II controlled substance.[2] Title 21 C.F.R § 1308.12(d)(1). *See Whalen v. Roe*, 423 U.S. 1313, 96 S.Ct. 164, 46 L.Ed.2d 18 (1975); *United States v. Anderson*, 184 F.3d 479, 480 (5th Cir. 1999); *United States v. Lane*, 931 F.2d 40 (11th Cir. 1991); *United States v. Daniel*, 813 F.2d 661 (5th Cir. 1987); *United States v. Corona*, 125 F.3d 863, 1997 WL 634122 (10th Cir. 1997); *United States v. Lafoon*, 978 F.2d 1183, 1184 (10th Cir. 1992). This error was contained in the indictment, which cited 21 U.S.C. § 841(b)(1)(D). Federal Rule of Criminal Procedure 7(c)(3) provides that "[e]rror in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of the conviction if the error or omission did not mislead the defendant to the defendant's prejudice." At least one circuit has held that an error in the indictment is an error under Fed.R.Crim.P.7(c)(3). *United States v. Corona*, 125 F.3d 863, 1997 WL 634122 (10th Cir. 1997) (citing *United States v. Kaiser*, 599 F.2d

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[1] The error was originally made by the government in the indictment. This was also the basis for the argument of movant's counsel in the memorandum in support of the motion to vacate (doc. 155 at 10), and went unchallenged in the government's responsive memorandum and via its failure to object to the recommendation.

[2] In *United States v. Daniel*, the court rejected the argument that since Congress subsequently amended Schedule II without explicitly adopting the administrative changes, they had not been adopted. 813 F.2d 661, 663 (5th Cir. 1987).

942, 943 (10th Cir. 1979)).[3] There is (no allegation) of prejudice in this case. Therefore, notwithstanding the fact that movant was charged under § 841(b)(1)(D), and the statutory listing of amphetamine as a Schedule III controlled substance, the penalties applicable to an offense involving the Schedule II substance amphetamine are set forth in 21 U.S.C. § 841(b)(1)(C). *Anderson, supra*. This section provides for a maximum penalty of 20 years imprisonment, or thirty years imprisonment if the defendant has a previous conviction for a felony drug offense. Movant's 188 month sentence was below this statutory maximum.[4]

Movant contended in his motion to vacate that because the jury returned a general verdict that did not specify which of the two controlled substances identified in the indictment, amphetamine or methamphetamine, was the basis for its finding of guilt, he must be sentenced as if the conspiracy involved distribution only of the drug carrying the lower penalty, in this case amphetamine. Although several courts have adopted this view,[5] it was

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[3] In *United States v. Charles Harrison*, 3:96cr57/RV, Chief Judge Vinson of this court noted at sentencing that the fact that the defendant had been charged under § 841(b)(1)(D) instead of § 841(b)(1)(C) for his amphetamine-related conduct was "a scrivener's error or at least a non-preducial error" (doc. 138 at 43). In that case, however, the error had apparently been noticed before trial.

[4] Because of this, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000) does not affect his case.

[5] *See United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2nd Cir.1984) (sentence of defendant charged in marijuana and cocaine conspiracy and who was sentenced to a term in excess of the statutory maximum for marijuana-related conspiracies was improper because the general jury verdict did not reveal whether the jury had found

(Continued on following page)

squarely rejected in *United States v. Edwards*, which held that "under the Sentencing Guildelines, the judge alone determines which drug was distributed, and in what quantity." 105 F.3d 1179, 1180 (7th Cir. 1997), *aff'd*, 523 U.S.511, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998) (citations omitted). In affirming the Seventh Circuit, the Supreme Court noted that the Guidelines instruct a sentencing judge to base a drug-conspiracy offender's sentence on the offender's "relevant conduct," and that this can include conduct that is outside of the offense of conviction, but is part of the "same course of conduct or common scheme or plan." 118 S.Ct. at 1477 (citing U.S.S.G. §1B1.3(a)(1) and (2)). Therefore, the Court reasoned that under the facts before it, so long as both controlled substances, in that case cocaine and crack cocaine, were part of either the offense of conviction or the same course of conduct, the Guidelines sentencing range would be identical. *Id.* The Court acknowledged that a statutory and constitutional claim could arise if the sentence of a defendant in a multi-substance conspiracy exceeded the maximum permitted by statute for a conspiracy involving only one of the substances, "because a maximum sentence set by statute trumps a higher Guidelines sentence." 118 S.Ct. at 1477. This situation did not arise in *Edwards*, as the defendants' sentences were within the statutory limits applicable to a conspiracy involving only cocaine, the substance with the

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defendant guilty of a cocaine-related or a marijuana-related conspiracy); *United States v. Barnesl*, 158 F.3d 662, 668 (2nd Cir. 1998); *Newman v. United States*, 817 F.2d 635 (10th Cir. 1987); *United States v. Owens*, 904 F.2d 411, 414-15 (8th Cir. 1990); *United States v. Bounds*, 985 F.2d 188, 194-95 (5th Cir. 1993); *United States v. Garcia*, 37 F.3d 1357, 1369-71 (9th Cir. 1994).

lesser penalties, given the quantities of that drug attributable to each participant. Likewise, in the instant case, movant's 188 month sentence did not exceed the 20-year statutory maximum for offenses involving Schedule II controlled substances, and no statutory or constitutional violation arises. Cf. *United States v. Riley*, 142 F.3d 1254 (11th Cir. 1998) (no error absent special verdict form since court could take into account relevant conduct at sentencing); *see also United States v. Dale*, 178 F.3d 429, 433 (6th Cir. 1999); *United States v. Stephenson*, 183 F.3d 110, 119 (2nd Cir. 1999).

Assuming for sake of argment that the drugs for which movant was held accountable were amphetamine rather than methamphetamine, and there was no relevant conduct to be considered, his sentence was still technically correct. The 1995 Sentencing Guidelines were used in the calculation of his sentence. The base offense level for 9.9 kilograms of amphetamine under the 1995 Guidelines would have been 32 instead of 34. Assuming all other adjustments were the same, movant's total offense level would have been 34 instead of 36. The applicable guidelines range would have been 151 to 188 months instead of 188 to 235 months. Therefore, movant's 188 month sentence would still have been within the applicable range, although at the high end, rather than the low end, of the range.

Accordingly, it is ORDERED:

That this court's July 20, 2000 recommendation be VACATED only as to the recommendation that the motion to vacate be granted as to count 1. In all other respects the recommendation shall remain in force.

And it is respectfully RECOMMENDED:

That Ground 1 of the motion to vacate (doc. 155) be denied for the reasons herein and the motion to vacate be denied in its entirety.

At Pensacola, Florida, this 30th day of March, 2001.

/s/ Miles Davis
MILES DAVIS
UNITED STATES
MAGISTRATE JUDGE

APPENDIX E

FOR THE ELEVENTH CIRCUIT

No. 01-13260-EE

DANNY K. BASS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITIONS(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19_, ___ F.2d ___).

BEFORE: BLACK, BARKETT and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ ROSEMARY BARKETT
UNITED STATES CIRCUIT JUDGE

APPENDIX F

U.S. CONSTITUTION: SIXTH AMENDMENT

Sixth Amendment – Rights of Accused in Criminal Prosecutions

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.